No. 84-267

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM P. CLARK, ET AL., PETITIONERS

v.

SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Bureau of Land Management's environmental assessment of the human health risks of using certain herbicides on specific federal lands, which relied, in part, upon a scientific evaluation of the health effects of the herbicide conducted by the Environmental Protection Agency (EPA) in registering the herbicides pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), satisfied the requirements of the National Environmental Policy Act of 1969 (NEPA) and its implementing regulations.

PARTIES TO THE PROCEEDING

The parties to this proceeding in addition to those listed in the caption are Robert Burford, William Leavell and Hugh Shera.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous: Page

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The Solicitor General, on behalf of the Secretary of the Interior, the Director of the Bureau of Land Management (BLM) and other BLM officials, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 720 F.2d 1475. The opinion of the district court is unreported (App., *infra*, 13a-24a).

JURISDICTION

The judgment of the court of appeals (App., *infra*, 25a) was entered on December 2, 1983. A petition for rehearing was denied on March 21, 1984 (App., *infra*, 26a). On June 8, 1984, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and

including August 1, 1984. On July 24, 1984, Justice Rehnquist further extended the time for filing a petition for a writ of certiorari to and including August 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. (& Supp. V) 4332, and relevant provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*, are reprinted at App., *infra*, 27a-33a.

STATEMENT

1. The Bureau of Land Management (BLM) is required by the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 (O&C Act), 43 U.S.C. 1181a *et seq.*, to manage public timber lands in western Oregon for the purpose of providing a "permanent source of timber supply * * * and contributing to the economic stability of local communities and industries * * *." 43 U.S.C. 1181a. Under the O&C Act, BLM may allow the timber to be harvested only according to the principle of sustained yield. 43 U.S.C. 1181a. Fifty percent of BLM's receipts from timber sold on O&C Act lands are distributed to eighteen designated county governments in Western Oregon. 43 U.S.C. 1181f.

In order to satisfy the mandate of the O&C Act, BLM in 1978 proposed to conduct an herbicide spraying program for a 10-year period on the federal lands subject to the Act. 1 Bureau of Land Management, U.S. Dep't of the Interior, *Vegetation Management With Herbicides: Western Oregon—Final Environmental Statement 1978*, at 1-24 [hereinafter cited as *Final Environmental Statement*].[1] The purpose of the spraying

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[1] BLM has for many years employed herbicides in connection with the management of the O&C Act lands within its control. Prior to 1977, BLM had conducted environmental assessments

was to prepare new sites for reforestation, to protect young conifers from surrounding vegetation, and to control noxious weeds and roadside vegetation (*id.* at 1-30 to 1-31). The agency proposed to use several methods to spray the herbicides; the most widely used method would involve aerial spraying from helicopters, made necessary by the difficult terrain and the remoteness of most sites. The agency also proposed to conduct ground spraying from either tanker trucks or backpacks. *Id.* at 1-32 to 1-33.[2]

As part of its proposal to use herbicides on O&C Act lands, the BLM prepared a programmatic environmental impact statement examining its proposed use of herbicides, all of which had been registered by the EPA pursuant to FIFRA and all of which are "in widespread and common use" (*Final Environmental Statement*

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of its herbicide proposals and found that they created no significant environmental impact requiring an environmental impact statement. Because in 1978 BLM proposed to use the herbicides Silvex and 2,4,5-T, which had come under the scrutiny of the EPA because of dioxin contaminants associated with those herbicides, BLM concluded that an impact statement should be prepared. BLM discontinued use of all herbicides during the 12-18 months during which the environmental impact statement was being prepared. *Final Environmental Statement* 1-23 to 1-24. A copy of the *Final Environmental Statement* has been lodged with the Clerk of the Court.

[2] Typically, the spraying program is conducted in discrete geographic districts. There are, for example, five local districts in western Oregon, each of which conducts its own spraying program. The spraying requirements vary from district to district and within the districts from year to year. Thus, one BLM district may spray 1,000 acres for site preparation and 1,000 acres for "release" of young conifers from competing brush in one year and 10 acres for each purpose the next. Ordinarily, a site sprayed for reforestation will not be sprayed again for several years, when it is necessary to release the conifer seedlings. After the release spraying, that site generally will not be sprayed again until after the trees are harvested, and the site is again prepared for reforestation. Spraying programs conducted in national forests by the Forest Service follow a similar pattern.

3-2). See pages 12-14, *infra*.[3] The programmatic EIS contained a thorough discussion of the known human health and other environmental consequences of the use of these herbicides (*id.* at 3-1 to 3-94). The EIS also emphasized that, although analysis of environmental impacts of herbicide use is within the primary jurisdiction of the EPA, the BLM would "keep abreast of * * * research findings and, where indicated by research results and EPA recommendations, adjust its proposed herbicide applications to minimize adverse environmental impacts" (*id.* at 1-48).[4]

In order to keep abreast of research developments and to maintain on a current basis its examination of potential site-specific environmental effects of the proposed vegetation management program, BLM prepared yearly environmental assessments. The site-specific impacts considered in the assessments included weather conditions, terrain, wildlife and the existence of residential areas with respect to proposed spraying during the forthcoming year. The assessments also considered the particular spraying techniques that might be used, how much spraying was required, what herbicides to use and how best to mitigate any adverse effects likely to be caused by the spraying. See, *e.g.*, Bureau of Land

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[3] The only proposed herbicide that received individualized analysis by the courts below was 2,4-D. To give some idea how commonly used 2,4-D is, there are approximately *1500* products containing 2,4-D registered with EPA. Over 60 million pounds of 2,4-D active ingredient were applied domestically in 1979, with most of that being used to control broadleaf weeds in small grains, field corn and on range and pastureland. N.Y. Times, Apr. 30, 1980, at A20, col. 6.

[4] The herbicides proposed for use by the BLM were 2,4-D, Silvex, Sinazine, Atrazine, Diuron, Picloram, Dalapon, Dicamba, Krenite and Glyphosate. *Final Environmental Statement* 1-38 to 1-41. Use of Silvex was discontinued when EPA suspended its registration because of a particular dioxin contaminant found in 2,4,5-T and Silvex.

Management, U.S. Dep't of the Interior, *1982 Final Vegetative Management Program: Supplemental Environmental Assessment* [hereinafter cited as *1982 Environmental Assessment*].[5]

2. In 1979, approximately one year after the publication of BLM's programmatic EIS, respondent, an environmental group, filed this action in the United States District Court for the District of Oregon. Respondent sought, under NEPA, to enjoin the BLM from spraying the proposed herbicides as part of the forest management program.[6] The complaint alleged that BLM violated NEPA by failing to prepare a new EIS for the

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[5] A copy of the *1982 Environmental Assessment* has been lodged with the Clerk of this Court.

[6] This was not the first challenge under NEPA to the federal government's use of herbicide spraying in Oregon. In *Citizens Against Toxic Sprays, Inc.* v. *Bergland (CATS I)*, 428 F. Supp. 908 (D. Or. 1977), an environmental group challenged the sufficiency of the Forest Service's EIS for herbicide spraying in the Siuslaw National Forest. The district court found that the EIS contained an inadequate discussion of the human health effects of spraying 2,4,5-T, a herbicide known to contain the highly toxic dioxin TCDD. 428 F. Supp. at 927. Of particular concern to the court was the failure of the EIS to disclose the fact that the EPA was conducting administrative hearings on the FIFRA registration status of 2,4,5-T. Because of the Forest Service's failure to disclose this information, as well as other information on the scientific controversy surrounding TCDD, the court enjoined the use of 2,4,5-T pending the preparation of an adequate EIS. The court, however, expressly declined to enjoin the use of 2,4-D, because it does not contain TCDD. 428 F. Supp. at 933.

While the government considered whether to appeal the injunction, the Forest Service proceeded to prepare a new EIS, which contained an extensive discussion of the human health effects of 2,4,5-T, as well as other herbicides. The discussion was based on a thorough review of published scientific studies and reports about likely health effects. In reviewing this new EIS, the district court, although not agreeing with the Forest Service's decision to use herbicides, lifted the injunction and found the EIS adequate. *Citizens Against Toxic, Sprays, Inc.* v. *Bergland (CATS II)*, 11 E.R.C. 1557 (1978).

spraying proposal for that year; that the programmatic EIS failed to discuss adequately the health impacts caused by herbicides; and that neither the programmatic EIS nor the yearly environmental assessments contained a "worst case" analysis within the meaning of 40 C.F.R. 1502.22.[7] After the district court denied respondent's motion for a preliminary injunction in 1979, the case lay dormant until 1982. In the interim BLM conducted its annual spraying program.

In 1982, the district court ruled on the parties' cross-motions for summary judgment (App., *infra*, 13a-24a). The district court found that the 1978 programmatic EIS contained an adequate discussion of the health effects of 2,4-D, because the agency had a duty only "to discuss *probable* effects known at the time" (*id.* at 18a (emphasis in original)).

The court, however, enjoined the spraying of herbicides pending completion of a worst case analysis pur-

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[7] 40 C.F.R. 1502.22 provides:

> When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.
>
> (a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
>
> (b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (*e.g.*, the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

suant to 40 C.F.R. 1502.22(b) and its inclusion in an environmental assessment. The court held that the existence of scientific uncertainty or of any gaps in relevant information concerning the possible human health effects of a proposed action was enough to trigger the regulation's requirement that an agency include a worst case analysis in its impact statement (App., *infra*, 20a). The court then found there was some scientific uncertainty with respect to the health effects on humans of even small dosages of 2,4-D; this was based largely on the inability of any expert to reject catagorically the possibility that any herbicide might cause cancer (*id.* at 21a-24a). Finally, the court held that the BLM could not rely upon the EPA's determination to register the herbicides pursuant to FIFRA as a justification for concluding that the uncertainty was too insubstantial to warrant a fuller inquiry into the problem. Instead, the court held that the BLM must prepare its own analysis of the environmental safety of the herbicides (App., *infra*, 23a n.3).[8]

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[8] The district court also ruled that the worst case analysis regulation applies to environmental assessments as well as to situations where an EIS is prepared (App., *infra*, 19a); the court of appeals affirmed as to this point (*id.* at 8a-10a).

The district court in a later opinion also denied respondent's request for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d), on the ground that the government's position was "substantially justified." *Southern Oregon Citizens Against Toxic Sprays* v. *Watt*, 556 F. Supp. 155 (D. Or. 1983). Respondent's cross-appealed the denial of the attorney's fees, and the court of appeals affirmed (App., *infra*, 11a). The court of appeals, however, held that fees were available for services rendered in connection with the appeal, because the government's position had become less justifiable in light of decisions of other courts interpreting 40 C.F.R. 1502.22 (App., *infra*, 11a-12a). Although we obviously maintain the view that BLM's position on appeal was not only substantially justified, but also absolutely correct, we are not seeking review by this Court of the separate, case-specific issue concerning the reasonableness of the government's position for purposes of the attorney's fees award.

The court of appeals affirmed (App., *infra*, 1a-12a). The court held that BLM was required to include a worst case analysis in its Environmental Assessment. It agreed with the district court that the "possibility that the safe level of dosage for herbicides is low or nonexistent creates a possibility of 'significant adverse effects on the human environment.' 40 C.F.R. § 1502.22" (App. *infra*, 6a). The court rejected the contention that BLM need not conduct a worst case analysis because the safety of these herbicides had been evaluated by the EPA when it registered them under FIFRA. Instead, the court held that the BLM "must assess independently the safety of the herbicides that it uses" and cannot rely upon another agency's analysis (App. *infra*, 8a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals, requiring BLM independently to assess the safety of the herbicides it uses as part of its statutorily-mandated vegetation management program, is an unprecedented expansion of the obligations of federal agencies under NEPA to gather and consider information about environmental impacts that might result from their proposed actions. By requiring federal agencies either to acquire perfect knowledge in fields that are by their nature uncertain, or to analyze totally hypothetical worst case scenarios, the court of appeals has distorted the essential purpose of NEPA, which is to assure that decision makers take reasonable steps to make themselves aware of environmental consequences that their actions may cause. Moreover, the court of appeals, by requiring each agency proposing to use registered herbicides to duplicate EPA's efforts and duties in registering the herbicides for a specific use pursuant to FIFRA, has rendered FIFRA irrelevant to federal agencies in a way that Congress could not have intended. Finally, the court's misapplication of NEPA will result immediately

in a tremendous waste of resources by BLM and threatens to cause lengthy and expensive delays in important land management and other programs that rely upon pesticides already registered by EPA under FIFRA.

1. a. Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), directs federal agencies when proposing actions that significantly affect "the quality of the human environment" to include a detailed statement "on the environmental impact of the proposed action * * *." This Court has held that this is a procedural requirement that obligates agencies simply to take a "hard look" at environmental consequences. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (quoting *NRDC* v. *Morton*, 458 F.2d 827,838 (D.C. Cir. 1972)). See *Baltimore Gas & Electric Co.* v. *NRDC*, No. 82-524 (June 6, 1983), slip op. 12. Moreover, this responsibility is limited by a rule of reason; this Court has never held that an agency must evaluate all possible environmental effects no matter how remote they may be. See *Metropolitan Edison Co.* v. *People Against Nuclear Energy (PANE)*, No. 81-2399 (Apr. 19, 1983), slip op. 7; cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 551 (1978) ("[t]ime and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved"). Instead, this Court has held that an impact statement's purpose is to provide information that would be useful to the decision maker in deciding whether to approve the proposed action. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. at 551; *Metropolitan Edison Co.* v. *PANE*, slip op. 9. Courts of appeals in applying NEPA's rule of reason test have routinely held that agencies "need not discuss remote and highly speculative consequences." *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). See, *e.g.*, *Warm Springs Dam Task Force* v.

Gribble, 621 F.2d 1017, 1026 (9th Cir. 1980); *Environmental Defense Fund, Inc.* v. *Andrus*, 619 F.2d 1364, 1375 (10th Cir. 1980); *Environmental Defense Fund, Inc.* v. *Hoffman*, 566 F.2d 1060, 1067 (8th Cir. 1977); *NRDC* v. *Morton*, 458 F.2d 827, 836-837 (D.C. Cir. 1972).

The decision of the court of appeals is unfaithful to these judicial interpretations of NEPA. The court did not even consider whether a "worst case analysis" with respect to the proposed use of herbicides was necessary because it could reasonably affect the agency's decision to proceed with its spraying program. Compare *Baltimore Gas & Electric Co.* v. *NRDC*, slip op. 12-13. Instead, the court focused solely upon 40 C.F.R. 1502.22, as though it had a life independent of NEPA. The court's conclusion that the language of the regulation could be construed to embrace the BLM's spraying proposal not only overlooks the fact that 40 C.F.R. 1502.22 is not an extension of NEPA but merely implements it (see *Sierra Club* v. *Sigler*, 695 F.2d 957, 971 (5th Cir. 1983); App., *infra*, 4a), but also is inconsistent with the decisions cited above holding that NEPA does not require an agency to consider environmental impacts that are merely remote possibilities.[9]

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[9] The regulation does not require a worst case analysis whenever there is uncertainty. A worst case analysis is required only if the information is "essential to a reasoned choice among alternatives" but its cost is exorbitant; or the information "relevant to adverse impacts is important to the decision" and there is no known way to obtain the information. 40 C.F.R. 1502.22(b)(1) and (2). In either event, the agency must still exercise discretion to decide for itself whether the information is important or essential to a decision. Both courts below analyzed this issue as if they were exercising de novo review. They analyzed the scientific evidence and concluded that the uncertainty warranted further inquiry. But this Court has repeatedly emphasized that with respect to technical matters surrounded by scientific uncertainty reviewing courts should defer to the agency's expertise and not substitute their judgment for that of the agency.

The only other court of appeals to interpret 40 C.F.R. 1502.22 has recognized that the regulations do not require analyses of wholly improbable consequences. In *Sierra Club* v. *Sigler*, *supra*, the court held that the Corps of Engineers erred in not producing a worst case analysis before deciding whether to build an offshore "superport" oil terminal. The court found that a catastrophic oil spill was a real possibility and that an analysis of the effects of a spill beyond a 24-hour period was beyond the state of the art of forecasting. The court therefore concluded that an analysis of such a spill was precisely what the worst case regulation intended. 695 F.2d at 972. The court stressed that its reasoning was limited to situations "where a real possibility of the occurrence *has been proved* and a data base for evaluating its consequences established." 695 F.2d at 975 n.14 (emphasis added).

In this record, there is no credible, scientific evidence that 2,4-D or any of the other proposed herbicides has any carcinogenic effects; and there is certainly no data base upon which any meaningful evaluation of the carcinogenic consequences of these herbicides can be based.[10] Instead, contrary to the reasoning in *Sigler*, the court below has ordered BLM to "concern itself with phantasmagoria hypothesized without a firm basis

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See *Chevron U.S.A., Inc.* v. *NRDC, Inc.*, No. 82-1005 (June 25, 1984), slip op. 26-27; *Baltimore Gas & Electric Co.*, slip op. 13; *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 557-558. Although BLM has no special expertise in evaluating the environmental risks of herbicides, EPA does and it has registered all of the herbicides that were proposed for use by the BLM. See page 14, *infra*.

[10] The district court concluded solely on the basis of the expert testimony that there was scientific uncertainty that compelled the BLM to conduct its worse case analysis. Courts are hardly well suited for making such judgments after a trial. See *Commonwealth of Kentucky ex rel. Beshear* v. *Alexander*, 655 F.2d 714, 720 (6th Cir. 1981) ("Mere disagreement among experts will not serve to invalidate an EIS.").

in evidence and the actual circumstances of the contemplated project, or with disasters the likelihood of which is not shown to be significantly increased by the carrying out of the project." 695 F.2d at 975 n.14. Cf. *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981).[11]

b. Another fundamental flaw in the court of appeals' analysis is its conclusion that BLM, when deciding whether to spray with registered herbicides, should independently evaluate the possible carcinogenic effects of the herbicides. This holding undermines EPA's decision under FIFRA to register these products for the very uses BLM proposed to make—a decision based on the very scientific inquiry the court has now ordered BLM to undertake. It is wholly implausible that Congress would, on the one hand, create an elaborate registration process for pesticides and put that process in the charge of the agency most capable of evaluating the environmental effects of using pesticides, and, on the other hand, also require each federal agency proposing to use a pesticide to replicate EPA's efforts before going forward.

In 1947, Congress enacted FIFRA, and in 1970, the Environmental Protection Agency was given responsibility for enforcing its registration and labeling require-

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[11] In *CATS I*, 428 F. Supp. at 933, the district court carefully limited its injunction to halt the spraying of 2,4,5-T and Silvex, which contain TCDD; the court expressly excluded 2,4-D from its order.

By contrast, in *Save Our Ecosystems* v. *Clark*, No. 83-3908, (9th Cir. Jan. 27, 1984), the court of appeals found inadequate a worst case analysis prepared by BLM in response to the district court's decision in this case. The court of appeals held that any possible effect on human health, no matter how unsubstantiated or speculative, must be considered a significant impact. As such, the agency is required to analyze that possible effect under NEPA. Thus, the law of the circuit is that until an agency can prove that a herbicide does not cause cancer in humans, it must assume that it does. This assumption must be made even if, as in this case, there is no credible scientific evidence to support such an assumption.

ments. Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15625 (1970). Soon thereafter, Congress amended FIFRA by adopting the Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 *et seq.* See *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 3-4. The 1972 amendments contained a comprehensive revision of FIFRA designed to strengthen the EPA's ability to protect the environment from a wide variety of potentially hazardous pesticides, including herbicides. See *Ruckelshaus* v. *Monsanto Co.*, slip op. 3; S. Rep. 92-838, 92d Cong., 2d Sess. 3-9 (1972); H.R. Rep. 92-511, 92d Cong., 1st Sess. 5-13 (1972).[12]

The amendments established new substantive criteria for FIFRA registration; EPA is now permitted to register an herbicide only after determining that the use of the herbicide would not cause "unreasonable adverse effects on the environment" (7 U.S.C. 136a(c)(5)(C)-(D)). The statute defines unreasonable adverse effects on the environment as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide" (7 U.S.C. 136(bb)). In order to determine if a pesticide will cause unreasonable adverse effects on the environment, EPA considers information from all available sources, including data submitted by the producer, with respect to the chemical nature and structure of the pesticide, as well as test results on the potential dangers of the product. These tests include acute toxicity studies, chronic toxicity studies (including research on carcinogenic effects), residue studies, environmental chemistry studies, and fish and wildlife studies. See 47 Fed. Reg. 53192-53221 (1982).[13]

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[12] The term "pesticides" includes herbicides. See Section 2(u) of FIFRA, 7 U.S.C. 136(u); 40 C.F.R. 162.3(ff)(9), 162.14(a) and (b)(3).

[13] The statute also authorizes EPA to require additional data from registrants who wish to maintain existing registrations, 7

At any time after a registration has been issued, the Administrator may issue a "Rebuttable Presumption Against Registration" (RPAR) notice based on a "validated test or other significant evidence raising prudent concerns of unreasonable adverse risk to man or to the environment." 7 U.S.C. 136a(c)(8). EPA has adopted regulations setting out the criteria for determining what are unreasonable adverse effects. 40 C.F.R. 162.11. The regulations require the Administrator to issue an RPAR notice whenever "a pesticide's ingredient(s), metabolite(s), or degradation product(s) meet or exceed any of the * * * criteria for risk, as indicated by tests conducted with the animal species and pursuant to the test protocols specified in the Registration Guidelines, or by test results otherwise available." 40 C.F.R. 162.11(a)(3). The criteria include both acute toxicity and chronic toxicity (including carcinogenic effects). 40 C.F.R. 162.11(a)(3)(i)-(ii).[14]

None of the herbicides BLM proposed to use in Western Oregon has had an RPAR issued against it. Nor is there any evidence that a petition has even been filed asking EPA to consider suspending the registration of these herbicides.

U.S.C. 136a(c)(2)(A)-(B), and requires a registrant, after registration, who receives or discovers additional factual information regarding unreasonable environmental effects to submit the new data to EPA. 7 U.S.C. 136d(a)(2). Congress also authorized EPA to classify a pesticide for restricted use only, 7 U.S.C. 136a(d), to suspend any or all uses of a registered pesticide, 7 U.S.C. 136d(c), and, if necessary, to cancel a registration, 7 U.S.C. 136d(b). The statute also allows a substance to be conditionally registered, but only after EPA determines that such registration for use will not significantly increase the risk of unreasonable adverse effects on the environment. 7 U.S.C. 136a(c)(7).

[14] The public has an opportunity to participate at the various stages of the FIFRA process. See., *e.g.*, 40 C.F.R. 162.6(b)(6), 164.20, 166.10. In addition, EPA's refusal to suspend or cancel a registration is subject to judicial review. 7 U.S.C. 136n.

Obviously, EPA's registration of an herbicide is not a guarantee of safety to either man or the environment. We recognize that in some cases a substance will be registered, even though it is known to cause serious environmental effects, on the basis that the benefits outweigh the risks. FIFRA requires the EPA, however, to balance the benefits against the risks on a use-by-use basis. This balancing process constitutes the core of FIFRA, and reflects the two concerns that most seriously animated Congress in passing the 1972 amendments: the need to use pesticides and the concern over possible environmental damage.[15] For example, a substance known to be harmful to man may be approved for use only in unpopulated areas, and only if it is the only substance known to be effective in eliminating a specific pest. This use restriction appears on the label, and failure to follow the label restrictions is unlawful. 7 U.S.C. 136j(a)(2)(G). This balancing process that EPA is required by FIFRA to follow effectively replicates the analytical and procedural examination called for by NEPA.[16]

The FIFRA process constitutes, in effect, the functional equivalent of an EIS for the use of a particular herbicide. See *Wyoming* v. *Hathaway*, 525 F.2d 66, 71-72 (10th Cir. 1975), cert. denied, 426 U.S. 906 (1976). See also *Environmental Defense Fund, Inc.* v. *EPA*, 489 F.2d 1247, 1256 (D.C. Cir. 1973); *Portland*

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[15] See S. Rep. 92-838, 92d Cong., 2d Sess. 3 (1972).

[16] Section 101(2)(C) of NEPA requires in part: "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." Here, BLM provided a copy of the draft programmatic EIS to the Environmental Protection Agency for its comments. EPA commented that the draft EIS was "most satisfactory * * * in terms of fairly presenting the basic known risk/benefit issues of the use of the ten herbicides which have been proposed for various spray projects" (*Final Environmental Statement 20*).

Cement Ass'n v. *Ruckelshaus*, 486 F.2d 375, 383-384 (D.C. Cir. 1973); S. Rep. 94-452, 94th Cong., 1st Sess. 9 (1975) ("[b]ecause the basic thrust and principal responsibility of EPA are to protect the environment, the Committee does not see a need to broaden the [economic] impact statement [for FIFRA registrations] to include the environment"). If EPA had prepared EIS's to accompany its FIFRA determinations for these herbicides, no one could argue credibly that BLM is required to replicate those studies in another round of EIS's. Indeed, CEQ regulations explicitly sanction reliance by one agency on another agency's environmental analysis. See 40 C.F.R. 1506.4. Such reliance is equally appropriate with respect to EPA's review of pesticides, because the agency's process, by satisfying the statutory demands of FIFRA, is consistent with the essential purpose of NEPA to assure that agencies consider environmental impacts prior to taking some action.

We are not contending that FIFRA absolves the proposing agency, here the BLM, from conducting a thorough examination of the probable environmental impacts of its specific spraying proposal. Questions such as where a pesticide should be used and just how it should be applied should be—and were—appropriately considered in environmental assessments prepared by BLM. In addition, the agency properly conducted a comprehensive search of published scientific literature on the possible health impacts of the spraying and updated that search yearly. See page 4, *supra*. We submit that these analyses by BLM, coupled with EPA's registration of the herbicides, satisfied NEPA.

To require BLM, as the court of appeals does, to go beyond this and to speculate about highly improbable and catastrophic events will not further NEPA's purpose of informing decision makers. Instead, it will merely mislead and confuse both decision makers and the public. An agency can expect misinformed, but strong, public opposition to a herbicide spraying program by assuming the "cancer at any dose" worst case

that is implicitly required here and explicitly required in the court of appeals' later decision in *Save Our Ecosystems* v. *Clark*, No. 83-3908 (9th Cir. Jan. 27, 1984).[17] Such an assumption will inevitably and wrongly lead the public to believe that the herbicides EPA has registered and the BLM has proposed to use are substantially carcinogenic substances. While the court's desire to see agencies consider "all possible long-range" environmental effects is perhaps understandable, such an examination is simply not required by NEPA.[18]

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[17] In *Save Our Ecosystems* v. *Clark*, No. 83-3908 (9th Cir. Jan. 27, 1984), the court rejected as inadequate BLM's worst case analysis for use of 2,4-D. In so doing the court stated (slip op. 23-24 n.9):

> More and more chemicals are added to our environment daily without adequate information about the long-range effects on health and environment. The EPA, in effect, acknowledges that data on the herbicides in this case are inadequate since the registration is conditional under an exception to the normal registration process.
>
> * * * * *
>
> Allowing administrative agencies to go ahead with programs without carefully considering *all possible* long-range effects of these chemicals would be contrary to the purposes of NEPA. If the BLM is to go ahead with the project in the face of these uncertainties, at least it must do so knowing the fate to which it may be condemning future generations.

The Secretary's Petition for Rehearing is still pending in that case.

[18] Given the statutory scheme, the court of appeals' requirement that BLM should not rely on FIFRA registration conflicts with this Court's admonition in *Metropolitan Edison Co.* v. *PANE*, slip op. 9, that courts should not require federal agencies "to expend considerable resources developing * * * expertise that is not otherwise relevant to their congressionally assigned functions." The primary congressionally assigned function of BLM is to protect and manage the Nation's public lands. Congress has assigned to EPA the task of determining which herbicides may be introduced into the environment. The court's decision upsets this congressionally-created scheme and forces federal agencies to expend resources developing toxicological expertise not otherwise relevant to their assigned functions (see

c. The only support the court of appeals offered for disregarding EPA's assessment of the environmental impact of herbicides was a prior Ninth Circuit decision, in which the court had said that "'[o]ne agency cannot rely on another's examination of environmental effects under NEPA'" (App., *infra*, 8a, quoting *Oregon Environmental Council* v. *Kunzman*, 714 F.2d 901 (1983)).

This conclusion is, of course, directly contrary to the CEQ regulation permitting one agency to rely on another's environmental analysis. See 40 C.F.R. 1506.4. If, however, the *Kunzman* court meant merely to say that one agency cannot completely delegate its NEPA obligations to another, its statement has no relevance to this case. BLM has evaluated all significant environmental effects that might reasonably follow from the site specific uses of herbicides (see page 4, *supra*).

Further, the ultimate authority for the "independent assessment" rule—the D.C. Circuit's decision in *Calvert Cliffs' Coordinating Comm.* v. *Atomic Energy Comm'n*, 449 F.2d 1109 (1971)—has been repudiated by Congress. In *Calvert Cliffs'*, the court held, inter alia, that the Atomic Energy Commission (AEC) had violated NEPA by refusing to examine actual impacts on water quality caused by operation of a nuclear power plant. The AEC had refused to consider water quality impacts as long as the power plant met water quality standards set by the "appropriate agency." 449 F.2d at 1122. The court held that NEPA required the AEC to conduct its own analysis of water quality impacts. *Id.* at 1123.

Thereafter, Congress passed the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No.

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pages 20-21, *infra*). Courts should not "'attribute to Congress the intention to * * * open the door to such obvious incongruities and undesirable possibilities.'" *Metropolitan Edison Co.* v. *PANE*, slip op. 9 (quoting *United States* v. *Dow*, 357 U.S. 17, 25 (1958)).

92-500, 86 Stat. 816, 33 U.S.C. 1251 *et seq.*, which comprehensively restructured the Nation's efforts to combat water pollution. In those Amendments Congress provided that nothing in NEPA authorized any federal agency either to review the adequacy of any water quality certification granted under the Act or to impose any effluent limitation other than that allowed by the Act. 33 U.S.C. 1371(c)(2)(A)-(B). In explaining this provision, the chief proponent of the original amendment, Senator Baker, citing the "far-reaching" *Calvert Cliffs'* decision, stated:

> My amendment would make it clear that for the purposes of making the kind of "balancing judgment" required by NEPA, each individual Federal permitting and licensing agency would not be required to develop its own special expertise with respect to water quality considerations.

See H.R. Rep. 92-911, 92d Cong., 2d Sess. 138 (1972), *reprinted in* Staff of Senate Comm. on Public Works, 93d Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 825 (Comm. Print 1973) [hereinafter cited as *Leg. Hist.*]. See also *Leg. Hist.* 182, 198, 202, 236.[19] Simi-

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[19] Even before the amendments, the Chairman of the CEQ had concluded that NEPA did not require each agency to conduct an independent assessment of environmental effects. In hearings before the Senate, Dr. Train commented:

> I do not believe the statute [NEPA] contemplates the duplication of expertise within the Federal Government.
>
> Obviously we would end up with every agency having to maintain a scientific staff that would duplicate every other agency, and I do not think anyone contemplates this, so, necessarily, I think it is implicit that in general there should be an ability on the part of the originating agency to accept, unless there is clear evidence of abuse of discretion, or something of that sort, the recommendation of the expert agency, but with all that, I still say that the responsible program agency cannot abrogate its overall responsibility to weigh all factors involved in reaching its decision.

larly, in the floor debates, Representative Dingall stated (*Leg. Hist.* 256):

> Section 511(c)(2) [33 U.S.C. 1371(c)(2)] seeks to overcome that part of the *Calvert Cliffs* decision requiring AEC or any other licensing or permitting agency to independently review water quality matters. But it does not affect the obligations of those agencies to consider alternatives and other environmental matters, such as esthetics, fish and wildlife, and so forth.

Congress's judgment in the 1972 amendments, although not controlling with respect to FIFRA, nevertheless represents a common sense rejection of the reasoning of the court below. It is simply unreasonable to assume that Congress somehow intended for BLM to disregard EPA's expertise on an issue committed to EPA's care.

2. The decision of the court of appeals will increase substantially the burden of governmental compliance with NEPA. The court has rejected BLM's reliance on EPA (together with BLM's supplemental use of a literature review) as an appropriate basis for deciding which herbicides, if any, to use on various sites. Accordingly, BLM must now conduct its own independent research on the health effects, particularly carcinogenic effects, of herbicides. This implicit requirement in the decision below was made explicit in the court's subsequent decision in *Save Our Ecosystems* v. *Clark*, slip op. 12-14.

BLM has estimated that such research would take at least five years to produce any meaningful result and would cost between $5 and $7 million annually. Even if BLM possessed the statutory and budgetary authority to conduct such research, it would still be forced to

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National Environmental Policy Act: Joint Hearings Before the Senate Comm. on Public Works and the Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 19 (1972).

forgo using herbicides on the O&C Act lands for a minimum of five years. In its environmental impact statement BLM estimated that not using any herbicides would reduce annual timber yields on O&C Act lands by 25% resulting in revenue loss to federal and local governments in excess of $20 million per year. *Final Environmental Statement* 8-44. In addition to this loss, BLM anticipated that a substantial number of acres of public grazing land would be lost because of the spread of weeds noxious to domestic livestock. In addition, thousands of lumber-related jobs would be lost in the region. *Id.* at 8-42, 8-43 to 8-44.[20]

The research requirement imposed by the court of appeals will also burden other federal agencies. (It immediately affects the Forest Service, which is a party in *Save Our Ecosystems*.) Many federal agencies use herbicides: the Department of Defense uses herbicides to control vegetation within its various installations; the Drug Enforcement Administration uses herbicides as a major weapon in its attempts to eradicate illegal marijuana farms; and the Army Corps of Engineers uses

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[20] Since the court of appeals' decision, a district court in Oregon has enjoined all herbicide use by BLM in Oregon and by the Forest Service in Oregon, Washington, and northern California. In issuing the injunction the district court stated that the court of appeals' decision in *SOCATS* left it no choice but to issue a total ban on herbicide use by the two agencies. *Northwest Coalition for Alternatives to Pesticides* v. *Block*, Civ. No. 82-6272 (D. Or. Jan. 6, 1984), appeal pending, No. 84-3821 (9th Cir.). The potential revenue loss attributable to *SOCATS* will thus be substantially greater than that estimated initially. We can expect other district courts in the circuit to follow suit. In addition, the worst case analysis issue is being increasingly used in the Ninth Circuit and other jurisdictions to halt proposed federal projects. See *Committee for Integrated Pest Management* v. *Block*, Civ. No. 82-0570 (D. N.M. Mar. 5, 1984); *National Wildlife Federation* v. *United States Forest Service* Civ. No. 82-1153-50 (D. Or. Aug. 6, 1984), as amended on reconsideration.

herbicides to eliminate undesirable aquatic vegetation that constitutes a hazard to navigation. Under the court of appeals' ruling, each agency must now independently assess the safety of the herbicides it uses. Thus, to comply with NEPA, each agency must develop and maintain a scientific staff to duplicate the studies and research conducted by EPA pursuant to FIFRA. NEPA, which is a procedural statute, simply does not require this duplication of effort and waste of resources.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1984

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 83-3562
83-3655
DC# 79-1098-FR

SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INC., PLAINTIFF-APPELLEE AND CROSS-APPELLANT

v.

WILLIAM P. CLARK*, SECRETARY OF THE INTERIOR, ET AL., DEFENDANTS-APELLANTS AND CROSS-APPELLEES.

Appeal for the United States District Court
for the District of Oregon
District Judge Helen J. Frye, Presiding

[Argued and Submitted November 9, 1983]

OPINION

Before: WRIGHT, GOODWIN, and BOOCHEVER, Circuit Judges.

WRIGHT, Circuit Judge:

This case requires that we determine the adequacy of the environmental analysis performed by the Bureau of Land Management of the Department of the Interior for its herbicide spraying program in Oregon forests. The district court found that considerable scientific un-

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*Substituted for former secretary, James Watt. Fed. R. App. P. 43(c)(1).

certainty existed as to the safe level of exposure to the herbicides used. It enjoined the BLM from further spraying until it performs a "worst case analysis" under 40 C.F.R. § 1502.22.

The question is whether 40 C.F.R. § 1502.22 requires an agency to perform such an analysis when significant scientific uncertainty exists about the safety of a program and the uncertainty cannot be eliminated by further study. We conclude that it does.

I. FACTS

Southern Oregon Citizens Against Toxic Sprays, Inc. (SOCATS) is a non-profit corporation whose members live near or use forests designated for herbicide spraying by the BLM. The latter annually sprays forest lands near Medford to control non-commercial vegetation and to promote timber production.

The BLM filed a programmatic Environmental Impact Statement in 1978 to cover its spraying program for the following ten years. This program contemplated the use of Silvex, 2, 4-D, and 12 other herbicides. The EIS addressed only the human health effects of Silvex. It noted that no adverse effects for the other herbicides were known.

Subsequently, the use of Silvex was suspended by the Environmental Protection Agency. The BLM has continued to spray with the other herbicides and has filed annual Environmental Assessments (EAs) to update the 1978 programmatic EIS.

In its 1979 suit to enjoin further spraying, SOCATS complained that the environmental documents prepared by the BLM were inadequate. Both parties moved for summary judgment.

The district court reviewed supporting affidavits and concluded that there was uncertainty regarding the safety of 2,4-D in small dosages. It noted particularly statements by one of the BLM's experts, Dr. Dost, who admitted to uncertainty among the scientific community

as to the carcinogenicity of 2,4-D. The court held that the scientific uncertainty, coupled with the potential danger to human health, required a worst case analysis.

It granted summary judgment to SOCATS and enjoined the spraying from which the BLM has appealed.

SOCATS sought attorney fees under the Equal Access to Justice Act. 28 U.S.C. § 2412(d)(1)(A) (Supp. 1983). The court held that SOCATS was the prevailing party but denied fees because the government's position was "substantially justified." *Southern Oregon Citizens Against Toxic Sprays* v. *Watt*, 556 F. Supp. 155 (D. Ore. 1983). SOCATS has cross-appealed.

II. ANALYSIS

A. The Need for a Worst Case Analysis

The "worst case analysis" regulation, 40 C.F.R. § 1502.22, was promulgated in 1979. It is part of the Council on Environmental Quality's (CEQ) comprehensive interpretation of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (NEPA). The CEQ's regulations are binding on administrative agencies and are entitled to substantial deference in the courts. *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979).

The worst case analysis regulation provides:

> *Incomplete or unavailable information.*
>
> When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.
>
> (a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

> (b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

40 C.F.R. § 1502.22.

The worst case analysis regulation codifies prior NEPA case law. *Sierra Club* v. *Sigler*, 695 F.2d 957, 971 (5th Cir. 1983). It requires disclosure and analysis of the "cost[s] of uncertainty—i.e., the costs of proceeding without more and better information." *Id.* at 970; *State of Alaska* v. *Andrus*, 580 F.2d 465, 473 (D.C. Cir.), *vacated in non-pertinent part sub nom. Western Oil & Gas Ass'n* v. *Alaska*, 439 U.S. 922 (1978).

The district court found that scientific uncertainty exists as to the safety of the herbicides and held that § 1502.22 applies because the spraying program could have an adverse impact on human health.

The BLM does not appeal the court's factual findings. It contends that: (1) the district court erred in requiring a worst case analysis, without also finding that the worst case is *probable* or *reasonably likely* to occur; (2) a worst case analysis is not required because the herbicides are registered by the EPA under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136 *et seq.* (Supp. 1983) (FIFRA); and (3) the court erred in holding that the BLM must perform a worst

case analysis in an Environmental Assessment. We reject each contention.

1. The Worst Case Analysis Regulation Applies to the Herbicide Spraying Program

The district court held that scientific uncertainty about the safety of the herbicides mandates a worst case analysis, "since herbicide spraying may have a direct impact on human health." The BLM contends that it should not have to consider impacts that are, in its judgment, neither likely nor probable. It argues that the language "significant adverse *effects* on the human environment" in § 1502.22, limits that regulation to situations in which the effect is reasonably probable.

Two other courts have considered the need for a worst case analysis under § 1502.22. *Sierra Club* v. *Sigler*, 695 F.2d 957 (5th Cir. 1983); *Village of False Pass* v. *Watt*, 565 F. Supp. 1123 (D. Ak. 1983). Both decisions were rendered after the district court's decision here. Both support its interpretation of § 1502.22.

In *Sigler*, the Fifth Circuit held that the Army Corps of Engineers must analyze the "worst case" of a catastrophic supertanker oil spill when evaluating the environmental consequences of a proposed oil port. The court read § 1502.22 to require separate consideration of (1) the worst case and (2) "the probability or improbability of its occurrence." *Id.* at 974. It said: "that the possibility of a total cargo loss by a supertanker is remote does not obviate the requirement of a worst case analysis. . . ." *Id.*

In *Sigler*, the "worst case" was an event of low probability but catastrophic effects and the scientific uncertainty concerned those effects. In contrast, this case involves a lack of information about the probability of any adverse effect. A more closely analogous situation is found in *False Pass*.

False Pass involved the adquacy of an EIS for lease sales of off-shore oil deposits. The court concluded that lack of information about the effect of seismic testing on endangered whale populations triggered § 1502.22. 565 F. Supp. at 1149-53. The court gave the government two alternatives: (1) obtain the missing information or, if that proved impossible, (2) prepare a worst case analysis. *Id.* at 1153. In either case, the government was required to reconsider the wisdom of its program.

The district court holding here accords with those later cases and with a common sense interpretation of § 1502.22. The government did not challenge the court's finding that "there is uncertainty about what is the safe level of dosage—or if there is one." The possibility that the safe level of dosage for herbicides is low or nonexistent creates a possibility of "significant adverse effects on the human environment." 40 C.F.R. § 1502.22. This potential calls for a worst case analysis.

The BLM's contention that it need not analyze a "worst case" unless it is "probable" contradicts the clear language of § 1502.22. This section requires that the agency prepare a worst case analysis "*and* indicat[e] to the decisionmaker 'the probability or improbability of its occurrence.'" *Sigler*, 695 F.2d at 974 (emphasis in original) (quoting 40 C.F.R. § 1502.22). The agency may not omit the analysis only because it believes that the worst case is unlikely.

The cases cited by the BLM to support its refusal to consider effects that it considers improbable are easily distinguished. *Trout Unlimited* v. *Morton*, 509 F.2d 1276 (9th Cir. 1974) was decided prior to the 1979 CEQ regulations. It involved consequences of dam construction that were distantly connected to the agency action. 509 F.2d at 1284. There was no information gap as to the improbability of the consequences. Here, the potential effect flows directly from the proposed action and there is scientific uncertainty regarding its likelihood.

Warm Springs Dam Task Force v. *Gribble*, 621 F.2d 1017 (9th Cir. 1980), involved an information gap about the effect of a newly discovered fault system on a proposed dam. 621 F.2d at 1020-21. We noted that the original failure to discuss this danger violated NEPA, but held that the agency cured the defect by commissioning an extensive study that supplied the missing information. *Id.* at 1025-26. By eliminating the uncertainty, the agency essentially complied with 40 C.F.R. § 1502.22(a), which requires an agency to obtain information relevant to adverse impacts that "is essential to a reasoned choice among alternatives" when the cost of obtaining it is not exorbitant. It had no need to conduct a worst case analysis under § 1502.22(b).

Further, the BLM's contention that the worst case is improbable is unsupported by the court's unchallenged findings. The court found scientific uncertainty regarding the likelihood of the worst case occurring. The BLM's *belief* that its herbicides are safe does not relieve it from discussing the possibility that they are not, when its own experts admit that there is substantial uncertainty. When uncertainty exists, it must be exposed.

2. Registration of a Herbicide Under FIFRA Does Not Alter the BLM's Duty to Prepare a Worst Case Analysis.

The BLM and amicus Monsanto contend also that a worst case analysis is not required because the herbicides have been registered by the EPA under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136, et seq. (Supp. 1983) (FIFRA).

This argument is foreclosed by *Oregon Environmental Council* v. *Kunzman*, 714 F.2d 901 (9th Cir. 1983), which involved the sufficiency of an EIS for the use of

pesticides that were registered under FIFRA. We said there:

> One agency cannot rely on another's examination of environmental effects under NEPA. . . . "Thus, the mere fact that a program involves use of substances registered under FIFRA does not exempt the program from the requirements of NEPA."

Id. at 905 (quoting *Citizens Against Toxic Sprays, Inc.* v. *Bergland*, 428 F. Supp. 908, 927 (D. Ore. 1977)). The BLM must assess independently the safety of the herbicides that it uses.

3. The Worst Case Analysis Regulation Applies to an Environmental Assessment (EA)

The BLM prepared a programmatic EIS in 1978 and annual EAs for individual applications. The original EIS was prepared before the effective date of the 1979 CEQ regulations. The district court held that the EIS was adequate. *See* 40 C.F.R. § 1506.12. It held, however, that subsequent EAs were deficient because they did not comply with § 1502.22.

The BLM argues that the regulation applies only "[w]hen an agency is evaluating significant adverse effects on the human environment *in an environmental impact statement*." 40 C.F.R. § 1502.22 (emphasis added). It notes that the regulation is codified in part 1502 of the CEQ regulations, which deals with impact statements. Therefore, the BLM contends, the regulation does not apply to EAs.

The district court rejected this argument and reasoned that the EA was an integrated part of the overall environmental analysis. This view more closely reflects the purposes of NEPA and the CEQ regulations.

"We start with the premise that a federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions." *Warm Springs Dam*, 621 F.2d at 1023. This continuing duty is especially relevant where the origi-

nal EIS covers a series of actions continuing over a decade. *See* Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Policy Act Regulation*, 46 Fed. Reg. 18026, 18036 (1981) (CEQ, *Forty Questions*). In general, an EIS concerning an ongoing action more than five years old should be carefully examined to determine whether a supplement is needed. *Id.*

The CEQ regulations encourage agencies to "tier" their environmental impact statements "to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review." 40 C.F.R. § 1502.20. The BLM uses annual EAs to supplement its programmatic EIS. The EAs must discuss new circumstances or information "relevant to environmental concerns and bearing on the proposed action or its impact." 40 C.F.R. § 1502.9(c)(1)(ii).

An EA need not conform to all the requirements of an EIS. *Foundation for North American Wild Sheep* v. *United States Department of Agriculture*, 681 F.2d 1172, 1178 n.29 (9th Cir. 1982). The EA must support the reasonableness of the agency's decision not to prepare a new or supplemental EIS. *Id.* Together, the EA and the programmatic EIS must "provide the information 'necessary reasonably to enable the decision-maker to consider the environmental factors and to make a reasoned decision.'" *Oregon Environmental Council* v. *Kunzman*, 714 F.2d at 904. The label of the document is unimportant. We review the sufficiency of the environmental analysis as a whole.

The programmatic EIS and the EA were inadequate without a worst case analysis. Including a worst case analysis in the EA allows the BLM to consider the scientific uncertainty in the least cumbersome manner, without having to prepare a new or supplemental EIS.

See Warm Springs Dam, 621 F.2d at 1027 (Kennedy, J., concurring) (approving agency decision to respond to a new environmental concern without preparing a formal EIS or supplement).

We hold that the BLM must prepare a worst case analysis before it may resume spraying and the annual EA is an appropriate place to include it.

B. Denial of Attorney Fees

SOCATS cross-appeals from the court's denial of attorney fees sought under the Equal Access to Justice Act. 28 U.S.C. § 2412(d)(1)(A) (Supp. 1983).

We review that decision for an abuse of discretion. *United States* v. *101.80 Acres of Land, More or Less, in Idaho County, Idaho*, 716 F.2d 714, 728 (9th Cir. 1983); *Foster* v. *Tourtellotte*, 704 F.2d 1109 (9th Cir. 1983). This standard applies even where summary judgment was granted in the underlying action. *See Foster*, 704 F.2d at 1110. The court's interpretation of the Act is subject to *de novo* review. *Id.* at 1111.

The Act authorizes attorney fees and expenses for prevailing parties in civil litigation involving a government agency unless the court finds that the agency's position was "substantially justified or that special circumstances would make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The test is one of reasonableness. To defeat an award, the government must show that "its case had a reasonable basis both in law and in fact." *Hoang Ha* v. *Schweiker*, 707 F.2d 1104, 1106 (9th Cir. 1983).

The district court determined that SOCATS was the prevailing party but held that the government's position was substantially justified. 556 F. Supp. at 157. It gave two reasons: (1) the BLM had prevailed on three out of four legal issues, and (2) § 1502.22 was a convoluted regulation which was difficult to interpret.

The first reason was improper. SOCATS' success on specific issues does not affect its status as a prevailing

party. *See Hensley* v. *Eckerhart*, ___ U.S. ___, 103 S.Ct. 1933 (1983). It also does not affect the substantial justification of the government's position. The four legal theories advanced by SOCATS were alternative approaches to a single desired remedy, an injunction against further spraying. SOCATS gained that remedy. The time spent by SOCATS on unsuccessful legal theories may be considered only in determining the amount of an award. *Id.* at 1943. *See* 28 U.S.C. § 2412(d)(1)(C).

To support its finding that the government's position was substantially justified, the trial court noted also the complexity of § 1502.22 and the absence of case law.

We do not agree that § 1502.22 is difficult to interpret. It is straightforward and means what it says. *Sierra Club* v. *Sigler*, 695 F.2d at 973. Much of the BLM's confusion about it was self-induced.

Nevertheless, we cannot say that the court abused its discretion by denying fees. The analysis required by the regulation is exceptional. F. McChesney, *CEQ's "Worst Case Analysis" Rule for EISs: "Reasonable" Speculation or Crystal Ball Inquiry?*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10069 (1983).

Further, the only reported case interpreting the worst case analysis regulation before this decision supported the government's position. *See Sierra Club* v. *Sigler*, 532 F. Supp. 1222 (S.D. Tex. 1982), *rev'd*, 695 F.2d 957 (5th Cir. 1983). With our limited scope of review, we affirm the court's decision to deny fees.

The situation on appeal is different. After the appellate decision in *Sigler*, the BLM had notice that its reading of § 1502.22 was untenable. It could also have consulted the CEQ's own interpretation of its regulations. *See* CEQ, *Forty Questions*, 46 Fed. Reg. at 18032. The Council stated explicitly that § 1502.22 applies to low probability/catastrophic impact situations, and to those where the probability of an impact is

unknown. *Id.* The government's position was no longer justified on appeal.

Within 30 days of this opinion, SOCATS will file with the clerk in quadruplicate a certificate upon which this court can base a fee award. *See* 28 U.S.C. § 2412(d)(1)(B). It will give the information required by *Kerr* v. *Screen Extras Guild*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976). The BLM may respond within 21 days thereafter.

CONCLUSION

We affirm the decision that the scientific uncertainty regarding the safety of the BLM's spraying program requires it to prepare a worst case analysis.

We affirm the denial of attorney fees below. The judgment is modified to allow reasonable fees on appeal.

AFFIRMED AS MODIFIED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 79-1098FR

SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, PLAINTIFF

v.

JAMES WATT, SECRETARY OF THE INTERIOR; ROBERT BURFORD, DIRECTOR, BUREAU OF LAND MANAGEMENT; WILLIAM LEAVELL, STATE DIRECTOR FOR OREGON, BUREAU OF LAND MANAGEMENT; HUGH SHERA, DISTRICT MANAGER FOR MEDFORD DISTRICT, BUREAU OF LAND MANAGEMENT; IN THEIR OFFICIAL CAPACITIES AND INDIVIDUALLY; DEFENDANTS

OPINION AND ORDER

FRYE, JUDGE:

Plaintiff challenges the adequacy of the Environmental Impact Statement (EIS) and the subsequent Supplemental Environmental Assessment (SEA) and Finding of No Significant Impact (FONSI) prepared by defendants in support of their herbicide spraying program in Jackson and Josephine counties of Oregon (Medford District). Plaintiff seeks to enjoin defendants from further spraying until adequate documents have been pre-

pared. Both parties have moved for summary judgment.

FACTS

Plaintiff is Southern Oregon Citizens Against Toxic Sprays, Inc., a non-profit corporation whose members live in Jackson and Josephine counties and use the public forests for recreation, food gathering, and employment. Many live near sites designated for herbicide spraying. Defendants spray the public forest lands annually in the Medford District with various herbicides as part of their program of vegetation management. The purpose of spraying with herbicides is to reduce the quantity of vegetation that is competing with the more desirable conifers, mainly Douglas fir. The spraying is intended to prepare sites for reforestation and to allow existing conifers to grow above competing vegetation.

In 1978 the United States Department of Interior, Bureau of Land Management (BLM), filed an EIS entitled *Vegetation Management with Herbicides: Western Oregon, 1978 through 1987.* This is a "program" EIS explained on page 1-1 of the EIS as follows:

> "The herbicide program described herein typifies the projected annual herbicide program. Therefore it is used as the basis for analyzing the environmental impacts that may be incurred during the 10-year period. This environmental statement is considered applicable for a 10-year period unless it is determined through the Bureau's annual review process that it does not adequately describe the environmental effects. The annual review process is accomplished by assessing the site specific environmental impacts of each districts [sic] herbicide program proposals. This assessment is described in a supplement to this Environmental Statement."

This program contemplated using the herbicide Silvex as well as 13 other herbicides including 2,4-D. The EIS devotes 15 pages to the human health effects of

Silvex, but does not address the human health effects of the other herbicides, except to conclude, "Except for Silvex, no potential long-term human health effects are known to result from the proposed action." The use of Silvex was thereafter suspended by the Environmental Protection Agency (EPA). The BLM has continued its herbicide program using the other herbicides, including 2,4-D.

This court is not to decide whether or not 2,4-D and the other herbicides are safe for use. The only issue before this court is whether defendants have complied with the procedural requirements of the National Environmental Protection Act (NEPA), 42 U.S.C. § 4321, et seq., in determining whether to use 2,4-D and the other herbicides.

LEGAL ISSUES[1]

Plaintiff makes four arguments:[2]

1. The shift from Silvex to other herbicides is a major federal action significantly affecting the environment,

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[1] Defendants contend that during the time for public comment on the EIS, plaintiff failed to present any comments as to the nature of 2,4-D similar to the allegations in its complaint and that plaintiff should be estopped to raise these allegations now. However, defendants admit that plaintiff has in a timely fashion exhausted its administrative remedies. Plaintiff therefore aptly characterizes defendants' contention as a type of laches defense. Plaintiff argues that its members have raised these same concerns over 2, 4-D at every opportunity and point to plaintiff's exhibits F and G showing lists of comments at the administrative level. Further, laches is not a favored defense in environmental cases. *Coalition for Canyon Preservation* v. *Bowers*, 632 F.2d 774, 779 (9th Cir. 1980). Defendants' defense of laches has no merit and will not be addressed further.

[2] Plaintiff also seeks a declaration of standing. Defendants do not dispute plaintiff's standing; therefore it is not an issue in this case.

thus necessitating the preparation of an EIS under 42 U.S.C. 4332(2)(C).

2. Each yearly spray proposal, and in particular the 1982 proposal for the Medford District described in SEA#OR-110-82-75, is a major federal action, thus necessitating the preparation of an EIS under 42 U.S.C. 4332(2)(C).

3. The defendants violated NEPA and regulations thereunder by failing to evaluate the human health effects of 2,4-D and other herbicides in the EIS.

4. Defendants violated 40 C.F.R. § 1502.22 by failing to include a "worst case analysis" in the Supplemental Environmental Assessment.

1. Does the shift from Silvex to other herbicides constitute a major federal action?

Plaintiff characterizes the shift from Silvex to other herbicides when Silvex was suspended by the EPA as "the equivalent, for NEPA purposes, of a brand new proposal to spray thousands of acres annually with 2,4-D, Picloram, Atrazine and other chemicals." Plaintiff argues that this change necessitates preparation of a new or a supplemental EIS, under 40 C.F.R. § 1502.9(C)(1).

Changes in a proposed government project may be so substantial as to require an additional or supplemental environmental impact statement. *Environmental Defense Fund* v. *Marsh*, 651 F.2d 983 (5th Cir. 1981). However, the defendants are not using any herbicides not mentioned in the final EIS. They have simply eliminated the one considered potentially harmful to human health. The herbicides used to replace Silvex are discussed in the EIS. Their properties remain the same whether they are used over 1,000 or 10,000 acres. The substitution of other herbicides for Silvex was considered as an alternative in the original proposal. This court concludes that this is not a substantial deviation

such as the court found in *Marsh, supra*. The change from Silvex to other herbicides is not a major federal action or a substantial change requiring preparation of a new or supplemental EIS.

2. Is the 1982 spray proposal for the Medford District a major federal action?

The 1978 EIS is a program EIS, designed to be applicable for ten years unless it is determined through an annual review process that it no longer adequately describes the environmental effects. Program EIS's are specifically provided for in NEPA's implementing regulation, 40 C.F.R. § 1500.4(i). The District Manager has made a finding that the proposed 1982 herbicide program for the Medford District does not involve significant impacts beyond those already analyzed in the EIS.

The spray proposal for 1982 for the Medford District is not a major federal action and therefore does not require preparation of a new or supplemental EIS.

3. Did defendants violate NEPA by failing to evaluate the human health effects of 2,4-D and other herbicides in the EIS?

The 1978 EIS only discusses the human health effects of Silvex. The EIS concludes, "Except for Silvex, no potential long-term health effects are known to result from the proposed action." EIS p. 6-3. Defendants contend that the concern of both the public and other agencies at that time was TCDD, a contaminant of Silvex, and no significant concern was expressed about the possible health risks of herbicides not containing TCDD.

An EIS need not discuss all possible environmental consequences of a given action. A reasonably thorough discussion of the significant aspects of the *probable* environmental consequences known at the time is all that is required by an EIS. *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). Since the EIS states that no long-term health effects are known to result

from the use of other herbicides, and since the defendants' duty is only to discuss *probable* effects known at the time, the failure to specifically deal with human health effects of 2,4-D and the other herbicides, while troublesome in retrospect, is not a violation of NEPA.

4. Did the defendants violate 40 C.F.R. § 1502.22 by failing to include a "worst case analysis" in the Supplemental Environmental Assessment?

Plaintiff argues that scientific uncertainty exists as to the human health effects of 2,4-D, therefore, pursuant to 40 C.F.R. § 1502.22, defendants had a duty to expose that uncertainty and to include a "worst case analysis" in the supplemental environmental documents, i.e., in the documents prepared after the EIS.

40 C.F.R. § 1502.22 provides:

"§ 1502.22 *Incomplete or unavailable information.*

"When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

"(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

"(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g. the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it

shall include a worst case analysis and an indication of the probability or improbability of its occurrence."

This regulation became effective July 30, 1979. 40 C.F.R. § 1506.12 provides:

"(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these regulations. No completed environmental documents need be redone by reason of these regulations.... However, nothing shall prevent an agency from proceeding under these regulations at an earlier time."

Defendants challenge the application of these regulations to any of the documents prepared in the herbicide program, since the draft EIS was prepared and filed prior to July 30, 1979.

This issue was addressed in *National Indian Youth Council* v. *Andrus*, 501 F. Supp. 649 (D. N. Mex. 1980). The court held that the two EIS's filed before July 30, 1979 were exempt from the 1979 regulations, but that the regulations applied to a FONSI and an EA prepared after July 30, 1979. The court stated:

"The first sentence of Part 1506.12 clearly states that the 1979 regulations are to be applied to 'the fullest extent practicable to ongoing activities and environmental documents begun before the effective date.' Both the FONSI and the EA are 'environmental documents' within the meaning of 40 C.F.R. Part 1508.10(1979)."

501 F.Supp. at 655. The 1982 SEA and FONSI in this case were filed after July 30, 1979. The regulations apply to them. Thus it is necessary to determine whether a "worst case analysis" should have been included in the supplemental documents.

The first part of 40 C.F.R. § 1502.22 provides that "When an agency is evaluating *significant adverse effects on the human environment* in an environmental impact statement ..." (emphasis added) certain steps must be taken by the agency. This court concludes that any potential harmful effect upon human health caused by herbicide spraying must be considered a significant adverse effect on the human environment. Therefore, the first part of § 1502.22 applies to this case.

The second part of 40 C.F.R. § 1502.22 provides "... and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists." In other words, an agency must make the public aware when it is contemplating action which may result in *significant* adverse effects on the human environment (in this case, human health) *and* either 1) there are gaps in the relevant information about the effects on the human environment of the action contemplated, or 2) there is scientific uncertainty about the effects on the human environment of the action contemplated. Furthermore, when there are informational gaps or uncertainties, the agency must either close those gaps or clear up those uncertainties or make a "worst case analysis" so that the agency can weigh the need to proceed against the risks of possible adverse environmental impacts.

This court must now determine from the affidavits and exhibits before it whether there are gaps in the information about the effects of 2,4-D or whether scientific uncertainties exist in the information about the effects of 2,4-D. The parties have agreed to this procedure.

Plaintiff contends that at any dosage level there are or may be adverse health effects caused by the use of the herbicide 2,4-D. Plaintiff also contends that there are gaps in the current literature about and studies of 2,4-D and that scientific uncertainty exists as to the ef-

fects of even small dosages. Defendants contend that the effects of 2,4-D upon human health depends on the level of dosage used. Defendants concede that there would be toxicity with high dosages, but that at the dosages used by the Forest Service there are no probable harmful effects of 2,4-D. Defendants stress that the Forest Service need address only the *probable* environmental consequences and not slim possibilities or suspicions. *Trout, Unlimited* v. *Morton, supra*. Defendants say that scientific uncertainty will nearly always exist to some degree.

Plaintiff has submitted the affidavits of two experts, Ruth Whisler Shearer and Melvin D. Reuber. Defendants have submitted the affidavits of four experts, Frank N. Dost, Logan A. Norris, Sheldon L. Wagner, and Harold Kalter. Both sides have submitted exhibits. Multiple affidavits have been submitted by both Dr. Shearer and Dr. Dost. Each challenges the other's conclusions and attempts to impeach the other's scientific credibility.

From reading the affidavits the court is convinced that there is scientific uncertainty or that gaps exist as to the effects of even small dosages of 2,4-D. Dr. Dost states in an article entitled "Toxic Hazards Associated with Use of Herbicides in Forestry," that:

> "There is presently valid scientific disagreement on the applicability of the threshold concept in assessing the dose necessary to initiate cancer. The reason is that cancer is a proliferative disease, and it is argued by some that any dose of a carcinogen, no matter how minute, has some finite probability of causing cancer. Evidence that this is not the case in higher animals is now in the process of publication. . . ."

"Toxic Hazards," p. 3. (*See also*, affidavit of Dr. Shearer, pp. 4-6) In his Reply Affidavit, Dr. Dost states, at p. 2:

> "I have not taken a position that a real threshold exists. My position in that particular regard is that the experimental evidence is not yet adequate to conclude that thresholds do or do not exist, and that point is made on page 5, lines 5-7 of my prior affidavit. The real scientific issue is whether, for chemicals of weak or questionable genetic activity, practical thresholds can be established at which the risk is so low as to be indistinguishable from zero."

In the same paper on Toxic Hazards, Dr. Dost states at p. 9:

> "2,4-D was registered long before such testing [for carcinogenic potential] was required, however, and studies of its carcinogenic potential were done much later. Those studies have evoked some dispute. The two experiments considered most useful ... are less comprehensive than current research standards dictate. Although they resulted in negative conclusions about the ability of 2,4-D to cause cancer, there has been an argument that re-examination of the pathology does show an increased incidence of tumors. These arguments have revolved principally around the contention of a single pathologist that his re-examination of the tissues does show evidence of carcinogenic change. Further examination by other consulting pathologists has not supported that opinion."

The "single pathologist" referred to is Dr. Reuber, one of plaintiff's two expert witnesses. Dr. Reuber discusses his review of the Federal Drug Administration rat study on 2,4-D. He disputes the conclusions of its authors that a carcinogenic effect of 2,4-D is not shown. While defendants have attempted to impeach Dr. Reuber's scientific credentials (*see*, defendants' exhibits 8 and 9), Dr. Dost's own statements indicate that there is some question in the scientific community as to the carcinogenicity of 2,4-D. On pp. 9-10 of his paper on Toxic Hazards, Dr. Dost notes that questions have

been raised by a Russian study (though the methodology is considered deficient) and by Swedish studies.

In 1980, EPA reviewed the health effects studies of 2,4-D, concluding that "significant information gaps exist on the effects of 2,4-D, preventing a definite conclusion on the safety of the herbicide," and requesting manufacturers to provide additional information. See attachment to Supplementary Affidavit of Dr. Shearer. After that announcement was made, a review of possible data gaps with 2,4-D was made by the Scientific Advisory Panel to EPA to determine test-requirements needed to support continued registration of the substance.[3] The Panel's report is Appendix III to Dr. Dost's Reply Affidavit. It shows that the Panel concurred in the EPA's determination that certain tests be carried out including tests for "oncogenicity," (tumor

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[3] In their final Reply Memo defendants argue that BLM is entitled to rely on the research and findings of EPA in its administrative proceedings regarding registration of herbicides and need not duplicate EPA's statutory function of determining the environmental safety of an herbicide. In opposition, plaintiff cites the case of *Citizens Against Toxic Sprays* v. *Bergland*, 428 F. Supp. 908 (D. Ore. 1977) in which Judge Skopil stated:

> "Nor can the Forest Service avoid its obligations under NEPA by arguing that any necessary scientific inquiry must be conducted by the EPA. NEPA mandates a case-by-case balancing judgment on the part of federal agencies. The only agency in a position to make such a judgment in a particular case is 'the agency with overall responsibility for the proposed federal action—the agency to which NEPA is specifically directed.' ... The responsible agency may not attempt to abdicate to any other agency merely because that agency is authorized to develop and enforce environmental standards. ... Thus, the mere fact that a program involves use of substances registered under FIFRA does not exempt the program from the requirements of NEPA. ... [citations omitted]

428 F. Supp. at 927. Defendants' argument has no merit.

promotion) as the information from existing studies is either insufficient or is disputed by Dr. Reuber.

The court concludes that there is scientific uncertainty about the carcinogenic and mutagenic potential of 2,4-D and there is uncertainty about what is the safe level of dosage—or if there is one. The degree of scientific uncertainty is sufficient since herbicide spraying may have a direct impact on human health to require a "worst case analysis" to be made. The probability of the "worst case" actually happening can then be assessed and risks evaluated if the Forest Service determines to proceed in spite of the uncertainty.

IT IS ORDERED that plaintiff's motion for summary judgment is GRANTED. Defendants are enjoined from further spraying until they have fully complied with 40 C.F.R. § 1502.22.

DATED this 9th day of September, 1982.

/s/ _____

HELEN J. FRYE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-3562
83-3655
DC CV 79-1098 HJF

SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INCS., PLAINTIFF-APPELLEE, CROSS-APPELLANT

v.

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, ET AL., DEFENDANTS-APPELLANTS, CROSS-APPELLEES

APPEAL from the United States District Court for the Portland District of Oregon

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the PORTLAND District of OREGON and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered December 02, 1983

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 83-3562/3655

Southern Oregon Citizens Against Toxic Sprays, Inc., et al., plaintiffs-appellees, cross-appellants

v.

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, ET AL., DEFENDANTS-APPELLANTS, CROSS-APPELLEES

[Mar. 21, 1984]

ORDER

Before: WRIGHT, GOODWIN, and BOOCHEVER, *Circuit Judges.*

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Goodwin and Boochever have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX E

National Environmental Policy Act of 1969, § 102, 42 U.S.C. 4332 provides in relevant part:

> § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts
>
> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> * * * * *
>
> (C) include in every recommendation or report on proposls for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (1) the environmental impact of the proposed action.
>
> (ii) any adverse environmental effects which cannot be avoided should be proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irriversible and irretrievable commitments of rescurces which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce

environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

Federal Insecticide Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.* provides in relevant part:

7 U.S.C. 136a(c)(5)

Approval of registration

The Administrator shall register a pesticide if he determines that, when considered with any restrictions imposed under subsection (d) of this section—

* * * * *

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

The Administrator shall not make any lack of essentiality a criterion for denying registration of any pesticide. Where two pesticides meet the requirements of this paragraph, one should not be registered in preference to the other. In considering an application for the registration of a pesticide, the administrator may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy. If a pesticide is found to be efficacious by any State under section 136v(c) of this title, a presumption is established that the Administrator shall waive data requirements pertaining to efficacy for use of the pesticide in such State.

7 U.S.C. 136(bb)

Unreasonable adverse effects on the environment

The term "unreasonable adverse effects on the environment" means an unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.

7 U.S.C. 136(u)

Pesticide

The term "pesticide" means (1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant: *Provided*, That the term "pesticide" shall not include any article (1)(a) that is a "new animal drug" within the meaning of section 321(w) of title 21, or (b) that has been determined by the Secretary of Health and Human Services not to be a new animal drug by a regulation establishing conditions of use for the article, or (2) that is an animal feed within the meaning of section 321(x) of title 21 bearing or containing an article covered by clause (1) of this proviso.

7 U.S.C. 136a(c)(2)

(A) Data in support of registration

The Administrator shall publish guidelines specifying the kinds of information which will be required to support the registration of a pesticide and shall revise such guidelines from time to time. If thereafter he requires any additional kind of information under subparagraph (B) of this paragraph, he shall permit sufficient time for applicants to obtain such additional information. The Administrator, in establishing standards for data requirements for the registration of pesticides with respect to minor uses, shall make such standards commensurate with the anticipated extent of use,

pattern of use, and the level and degree of potential exposure of man and the environment to the pesticide. In the development of these standards, the Administrator shall consider the economic factors of potential national volume of use, extent of distribution, and the impact of the cost of meeting the requirements on the incentives for any potential registrant to undertake the development of the required data. Except as provided by section 136h of this title, within 30 days after the Administrator registers a pesticide under this subchapter he shall make available to the public the data called for in the registration statement together with such other scientific information as he deems relevant to his decision.

(B) Additional data to support existing registration

(i) If the Administrator determines that additional data are required to maintain in effect an existing registration of a pesticide, the Administrator shall notify all existing registrants of the pesticide to which the determination relates and provide a list of such registrants to any interested person.

(ii) Each registrant of such pesticide shall provide evidence within ninety days after receipt of notification that it is taking appropriate steps to secure the additional data that are required. Two or more registrants may agree to develop jointly, or to share in the cost of developing, such data if they agree and advise the Administrator of their intent within ninety days after notification. Any registrant who agrees to share in the cost of producing the data shall be entitled to examine and rely upon such data in support of maintenance of such registration.

(iii) If, at the end of sixty days after advising the Administrator of their agreement to develop jointly, or share in the cost of developing, data, the registrants have not further agreed on the terms of the data development arrangement or on a proce-

dure for reaching such agreement, any of such registrants may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such service. The procedure and rules of the Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings, and the findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct. All parties to the arbitration shall share equally in the payment of the fee and expenses of the arbitrator.

(iv) Notwithstanding any other provision of this subchapter, if the Administrator determines that a registrant, with the time required by the Administrator, has failed to take appropriate steps to secure the data required under this subparagraph, to participate in a procedure for reaching agreement concerning a joint data development arrangement under this subparagraph or in an arbitration proceeding as required by this subparagraph, or to comply with the terms of an agreement or arbitration decision concerning a joint data development arrangement under this subparagraph, the Administrator may issue a notice of intent to suspend such registrant's registration of the pesticide for which additional data is required. The Administrator may include in the notice of intent to suspend such provisions as the Administrator deems appropriate concerning the continued sale and use of existing stocks of such pesticide. Any suspension proposed under this subparagraph shall become final

and effective at the end of thirty days from receipt by the registrant of the notice of intent to suspend, unless during that time a request for hearing is made by a person adversely affected by the notice or the registrant has satisfied the Administrator that the registrant has complied fully with the requirements that served as a basis for the notice of intent to suspend. If a hearing is requested, a hearing shall be conducted under section 136(d) of this title: *Provided,* That the only matters for resolution at that hearing shall be whether the registrant has failed to take the action that served as the basis for the notice of intent to suspend the registration of the pesticide for which additional data is required, and whether the Administrator's determination with respect to the disposition of existing stocks is consistent with this subchapter. If a hearing is held, a decision after completion of such hearing shall be final. Notwithstanding any other provision of this subchapter, a hearing shall be held and a determination made within seventy-five days after receipt for such hearing. Any registration suspended under this subparagraph shall be reinstated by the Administrator if the Administrator determines that the registrant has complied fully with the requirements that served as a basis for the suspension of the registration.

(v) Any data submitted uner this subparagraph shall be subject to the provisions of subsection (c)(1)(D) of this section. Whenever such data are submitted jointly by two or more registrants, an agent shall be agreed on at the time of the joint submission to handle any subsequent data compensation matters for the joint submitters of such data.

7 U.S.C. 136d(a)(2)

Information

If at any time after the registration of a pesticide the registrant has additional factual information regarding unreasonable adverse effects on the envi-

ronment of the pesticide, he shall submit such information to the Administrator.

7 U.S.C. 136a(c)(8)

Interim administrative review

Notwithstanding any other provision of this subchapter the Administrator may not initiate a public interim administrative review process to develop a risk-benefit evaluation of the ingredients of a pesticide or any of its uses prior to initiating a formal action to cancel, suspend, or deny registration of such pesticide, required under this subchapter, unless such interim administrative process is based on a validated test or other significant evidence raising prudent concerns of unreasonable adverse risk to man or to the environment. Notice of the definition of the terms "validated test" and "other significant evidence" as used herein shall be published by the Administrator in the Federal Register.